

No. 19-30353

In the United States Court of Appeals for the Fifth Circuit

In re REBEKAH GEE, Secretary of the Louisiana Department of Health; and
JAMES E. STEWART, SR., District Attorney for Caddo Parish,
Petitioners

JUNE MEDICAL SERVICES, LLC d/b/a HOPE MEDICAL GROUP FOR WOMEN, on
behalf of its patients, physicians, and staff; and DR. JOHN DOE 1 and DR. JOHN
DOE 3, on behalf of themselves and their patients,

Plaintiffs

v.

REBEKAH GEE, in her official capacity as Secretary of the Louisiana
Department of Health; and JAMES E. STEWART, SR., in his official capacity as
District Attorney for Caddo Parish,

Defendants

On Petition for Writ of Mandamus to U.S. District Court, Middle
District of Louisiana
No. 17-cv-404-BAJ-RLB

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

Plaintiffs' Opposition largely avoids engaging with the substance of the Petition, let alone with the details of Plaintiffs' pleadings or the district court's decisions. Defendants thus provide this Reply for the limited purpose of addressing discrete issues where the Court may find additional development helpful.

REASONS WHY THE WRIT SHOULD ISSUE

I. PLAINTIFFS DISTORT BOTH THE DISTRICT COURT'S OPINION AND THEIR OWN PLEADINGS.

Plaintiffs present the district court's decision as an application of ordinary pleading standards to an ordinary challenge to a collection of State laws, and concluding that those standards were met. Opp. at 24. They accuse Defendants of "grossly misrepresent[ing]" their claims. Opp. at 6, 14; *id.* at 11, 12. But Plaintiffs stretch to avoid discussing what their Amended Complaint and the district court *actually said*. Plaintiffs' Opposition thus leaves no doubt that Plaintiffs and the district court both understand the Amended Complaint exactly as Defendants explained it.

First, Plaintiffs claim that the district court merely "appl[ied] the well-established pleading standard" and found that "Plaintiffs had pleaded facts sufficient to support their challenge to each statute and

regulation under ... Rule 8.” Opp. at 26. That is not a fair characterization of the district court’s reasoning. As Defendants showed in their Petition, Defendants asked the district court to individually analyze Plaintiffs’ claims against each challenged law, but the district court *declined* to do so. Pet. at 14. The district court recognized that “[i]n a vacuum, Defendants’ arguments appear persuasive” — in other words, that Plaintiffs had *not* adequately challenged each law individually. *Id.* The district court even noted an example of an inadequately pleaded challenge that would be dismissed under that ordinary standard. *Id.* (citing Plaintiffs’ challenge to La. Admin. Code § 48:4403). But the district court, remarkably, held that applying the usual standards would be “*untenable*” in light of *Hellerstedt*. Doc. 103 at 14–15 (emphasis added). The district court also acknowledged that the Amended Complaint still brought “cumulative effect claims,” but refused to reconsider its original position that such claims are authorized by *Hellerstedt*. *Id.* at 13–14.

Plaintiffs try to divide the district court’s opinion into alternative rulings on Plaintiffs’ cumulative and individualized challenges. Opp. at 28. But that does not make either part of the district court’s analysis *dictum*. See, e.g., *Ramos-Portillo v. Barr*, 919 F.3d 955, 962 n.5 (5th Cir.

2019). In fact, the parts of the opinion identified by Plaintiffs are not true alternatives at all, but interrelated manifestations of the same error: A holding that it would be “untenable” to expect Plaintiffs to meet the usual pleading and jurisdictional requirements.

One *consequence* of the district court’s permissive approach is that Plaintiffs may challenge a bundle of laws in a single cumulative claim. Doc. 103 at 13–14. Another is that Plaintiffs may proceed with all their claims having merely given Defendants’ “notice” of which laws they want to challenge “cumulatively, and to the extent possible, individually.” *Id.* at 15. Regardless, the underlying error sets the stage for jurisdictionless, standardless proceedings unless corrected.

Second, Plaintiffs accuse Louisiana of “mischaracteriz[ing]” the scope of their claims. Opp. at 11. Plaintiffs assert that their challenge to OAFLA only covers the 13 regulations specifically identified in their Amended Complaint. Opp. at 11. But that is impossible to square with the Amended Complaint itself.

Their challenge to OAFLA shows that their claim is broader. If Plaintiffs only meant to challenge the 13 named regulations, they presumably would not have challenged OAFLA *at all*. In fact, Plaintiffs

(1) challenge OAFLL “*including* as applied through” the 13 named regulations (not *limited to* the regulations), *see* Doc. 87 at 53, ¶ 185, (2) claim that OAFLL *itself* is unconstitutional “on its face” (that is, as an authorization for rulemaking, regardless of the regulations), *id.* at 58–59, and (3) request injunctive relief restraining Defendants from “enforcing” OAFLL *in any way*, *id.* at 60. Plaintiffs have not waived any of those pleadings and the district court’s decision does not limit them in those respects. It is therefore inescapable that they are challenging not just *particular* licensing regulations, but the *entire structure of regulation, including its legislative authorization* — and as Defendants have noted, this goes all the way down to the regulation requiring sterile instruments, *see* La. Admin. Code § 48:4447; Pet. 9–10. Plaintiffs’ representations should not obscure their real aims.¹

¹ That is not to say Plaintiffs’ statements should have no effect. Initially they refused to even identify the statutes, regulations, and State acts they were challenging. *See* Doc. 82-3 at 4–5. When Defendants petitioned for permission to appeal the certified Order denying their first motion to dismiss, Plaintiffs amended their original Complaint, mooted the appeal. Pet. at 9. From the outset, Plaintiffs’ allegations have been a moving target. In the event this Court declines to issue mandamus, Plaintiffs’ representations should be treated as a judicial admission on the scope of their claims. They should be estopped from attempting to *re-enlarge* their pleadings on remand.

II. PLAINTIFFS' CUMULATIVE-EFFECTS THEORY FAILS.

Plaintiffs' principal defense of their cumulative-effects theory is that it merely applies the rule that challenged laws must be evaluated "in context." Opp. at 29. Plaintiffs cite several cases for that proposition. *Id.* at 29–30.² Defendants do not disagree that factual and legal context matters in any case, including challenges to State laws. But Plaintiffs' challenge is different.

First, a cumulative-effects challenge raises unique problems that do not arise from simply considering a challenged law in context. A cumulative-effect challenge gives Plaintiffs the option of endlessly packaging and repackaging vague, global challenges in different combinations until they find one that succeeds — or perhaps just scaling up from dozens to scores or hundreds of challenged laws. It gives them the option of challenging an entire regulatory structure every time it is

² Plaintiffs' cases are distinguishable. One is only a concurring opinion by Justice O'Connor, writing only for herself, addressing a hypothetical that was not even before the Court. *Clingman v. Beaver*, 544 U.S. 581, 606–08 (2005) (O'Connor, J. concurring). Others did not genuinely involve the cumulative effects of multiple regulations, but a *single* requirement about the length of truck trailers. *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 431–32 (1978); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 665–67 (1981). Others merely involved the uncontroversial principle that a court must consider pieces of evidence together rather than in isolation. See *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 766 (1976); *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). None remotely holds that multiple unrelated laws can be challenged on a purely cumulative basis.

amended or augmented, or even a single new rule is promulgated. Of equal concern, if not greater, it divorces the judicial inquiry from evaluating the particular purpose or effect of particular laws, and forces a fundamentally *political* inquiry into the overall purpose or effects of an entire scheme in every new case.

Those concerns are heightened in the context of abortion, where the diversity of the challenged laws and the complexity of the abortion decision makes a cumulative analysis impossible (at least under judicial rather than political standards). Strikingly, *not one* of the abortion cases Plaintiffs raise as precedent involves a cumulative-effects challenge, as opposed to simple evaluation of a specific challenged law in its factual and legal context. Opp. at 30–32.

Plaintiffs argue that if “[t]aken to its logical extreme,” Defendants’ prohibition would enable a State to ban all abortions by enacting “one that prohibits abortion in rooms painted blue and another that prohibits abortion in rooms not painted blue.” Opp. at 34 n.6. But there would be no need to challenge both statutes cumulatively. An abortion provider could challenge *one*, and point out that it burdens abortion in light of the context of the other: in other words, in its legal context. Employing a

cumulative-effect challenge would create problems of its own, because it would call on a court to enjoin *two* laws where enjoining *one* would have the desired result. Even in Plaintiffs' farfetched hypothetical, a cumulative-effect challenge would solve nothing.

Second, Plaintiffs overlook that even if a cumulative-effects challenge could be used to enjoin abortion regulations *en masse*, Plaintiffs would still need to bring an independent, justiciable claim against each component regulation. Pet. at 28-32. As Defendants have shown, Plaintiffs' cumulative-effect challenges fail that test.³

³ An "*en masse*" injunction would be the functional equivalent of placing the State under federal supervision as to abortion regulation. Principles of federalism and comity require a federal court to "take great care" when enjoining state laws. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2351–52 (2016) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting) ("Federal courts have no authority to carpet-bomb state laws, knocking out provisions that are perfectly consistent with federal law, just because it would be too much bother to separate them from unconstitutional provisions.").

After filing their Petition, Defendant Gee filed a conditional cross-petition explaining that abortion providers — including most of the Plaintiffs in this case — lack standing to challenge health and safety regulations on behalf of their patients. See Conditional Cross-Petition, *June Med. Servs. v. Gee*, No. 18-1460 (S. Ct. May 20, 2019). Abortion providers are in conflict with their patients in such cases, and nothing hinders their patients from asserting their own rights. See *Hellerstedt*, 136 S. Ct. 2292, 2321–2323 (Thomas, J., dissenting). The same arguments apply here.

III. MANDAMUS IS APPROPRIATE IN THE CURRENT PROCEDURAL POSTURE.

Plaintiffs' principal argument is not that the district court was right, but that this Court should *wait* for a final judgment and direct appeal before correcting it. Opp. at 1; *id.* at 17–18, 19–20 (collecting cases denying mandamus to correct denials of dispositive motions). But the Fifth Circuit in fact *does* issue mandamus when a district court denies dispositive motions and further proceedings would exceed federal jurisdiction. In *In re Dutile*, a district court denied a motion to remand to State court. 935 F.2d 61 (5th Cir. 1991). This Court granted mandamus, explaining that “if we do not grant the writ, petitioners would be trapped in a federal forum they did not choose” and that it would be “absurd” to “require petitioners to go to trial in federal court and await an appellate remedy.” *Id.* at 64. Defendants cited *Dutile* in the Petition, *see* Pet. at 36, but Plaintiffs do not even cite it, much less distinguish it.⁴

⁴ There is also the more general proposition that when mandamus is sought in order to “confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course.” *In re Reyes*, 814 F.2d 168, 170 (1987) (quoting *United States v. Denson*, 603 F.2d 1143, 1145 (5th Cir. 1979) (en banc)) (quotes omitted); Pet. at 35–36. Plaintiffs do not cite or distinguish those cases either.

One of Plaintiffs' own authorities, *In re Fibreboard*, [893 F.2d 706](#) (5th Cir. 1990), underscores that mandamus is appropriate to halt lower court proceedings that — as in this case — exceed judicial authority and turn into policymaking exercises. *See* Opp. at 18, 22. In *Fibreboard*, defendants in a mass tort case petitioned for mandamus to correct certain trial procedures adopted by the district court. The petitioners objected that the challenged trial procedures would have abandoned “traditional” proof of individual claims by individual plaintiffs in favor of collective statistical evidence provided by experts. *See* [893 F.2d at 709–11](#). This Court agreed and granted the writ: “The core problem is that [the district court’s procedure], while offering an innovative answer to an admitted crisis in the judicial system, is unfortunately beyond the scope of federal judicial authority.” *Id.* at 711. Adopting the challenged procedures would effectively turn lower court proceedings into “something other than a trial within our authority,” namely, a political inquiry “better addressed to the representative branches—Congress and the State Legislature.”⁵

⁵ The *Fibreboard* Court specifically connected its grant of mandamus to the fact that claims that should have been addressed individually would be addressed as a collective whole: “The inescapable fact is that the individual claims of 2,990 persons will not be presented. Rather, the claim of a unit of 2,990 persons will be presented.” [893 F.2d at 711](#).

Id. at 712. The petitioners presumably *could* have waited for the unfair trial to lead to a final decision and sought relief on direct appeal. But this Court granted mandamus nonetheless.

Analogous considerations govern here. As shown above and in the Petition, Plaintiffs seek to replace the traditional rule of individualized, well-pleaded, justiciable challenges to particular laws with collective challenges to whole sets of laws. The district court, concerned that individualized challenges would limit the number and breadth of challenges to abortion regulations, permitted Plaintiffs to do so. Doc. 103 at 14–15. In so doing, the district court abandoned the judicial character of the proceeding and turned it into a political one.

The burdens Defendants identify are not mere costs of discovery and trial. The real problem is the underlying deprivation of a judicial process characterized by notice, Article III jurisdiction, and judicially manageable standards (amplified by casual disregard of the infringement of Louisiana’s sovereign immunity). The costs are objectionable because they are ancillary to a proceeding that is *ultra vires* in the first place. *Dutile*, *Reyes*, and *Fibreboard* confirm that mandamus is available to bring prompt relief, and none of Plaintiffs’ cases is to the contrary.

CONCLUSION

This Court should grant a writ of mandamus and order the district court (1) to dismiss Counts I and V of the Amended Complaint, and (2) to evaluate Plaintiffs' challenges to individual abortion laws under the correct pleading and jurisdictional standards.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 21, 2019, I filed the foregoing brief with the Court's CM/ECF system, which will cause a copy to be served on all counsel of record.

I further certify that on June 21, 2019, I caused a copy to be delivered to the district court by Federal Express:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 21(d)(1) because it contains **2,285** words, exclusive of parts of the brief exempted.
2. This brief complies with Federal Rule of Appellate Procedure 32(c)(2), including the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011, Century Schoolbook, 14-point font.
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June 21, 2019